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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/810,671	03/29/2004	Veronika Hochstein	MERCK-2867	1160
23599 7590 03/07/2008 MILLEN, WHITE, ZELANO & BRANIGAN, P.C. 2200 CLARENDON BLVD. SUITE 1400 ARLINGTON, VA 22201				
EXAMINER KOSLOW, CAROL M				
ART UNIT		PAPER NUMBER		
1793				
MAIL DATE		DELIVERY MODE		
03/07/2008		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/810,671

**Applicant(s)**

HOCHSTEIN ET AL.

**Examiner**

C. Melissa Koslow

**Art Unit**

1793

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 23 January 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1, 2, 5-8, 10, 20, 21 and 23-27 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 2, 5-8, 10, 20, 21 and 23-27 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

This action is in response to applicants' amendment of 23 January 2008. The amendments to the claims have overcome the 35 USC 112 rejection, the nonstatutory obviousness-type double patenting rejection and the art rejections based on WO 03/6558 and JP 2001-11340. Applicant's arguments with respect to the remaining art rejection have been fully considered but they are not persuasive.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1, 2, 5-8, 10, 20, 21 and 23-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. patent 6,517,628 in combination with U.S. patent 6,060,071.

U.S. patent 6,517,628 suggests lipsticks, shampoos and shower gels, which are also termed bath gels, comprising a pigment mixture and conventional additives for these cosmetics, such as preservatives and oils for lipsticks and surfactants, water and fragrance for shower gels and shampoos. Shampoos and shower gels are surfactant-containing cleansers. The reference teaches the pigment mixtures for these cosmetics comprises a mixture of component A which is a multilayered pigment and component B which are platelet, acicular or spherical shaped colorants and/or fillers. The multilayered pigment of component A possesses one of the following structures: substrate+ferric oxide layer+silica layer+ferric oxide layer; substrate+ferric oxide layer+silica layer+titanium layer; substrate+titanium layer+silica layer+ferric oxide layer; substrate+titanium layer+silica layer+ferric oxide/titanium layer; substrate+ferric oxide/titanium layer+silica layer+ferric oxide/titanium layer and substrate+titanium layer+silica layer+chromic oxide layer; where the substrate can be glass flakes having a thickness in the range of 0.4-2 microns, which overlaps the claimed range. Product claims with numerical ranges which overlap

prior art ranges were held to have been obvious under 35 USC 103. *In re Wertheim* 191 USPQ 90 (CCPA 1976); *In re Malagari* 182 USPQ 549 (CCPA 1974); *In re Fields* 134 USPQ 242 (CCPA 1962); *In re Nehrenberg* 126 USPQ 383 (CCPA 1960). Pigment B can be pearlescent, multilayered or interference pigments or spherical pigments of titania, colored silica, calcium sulfate, iron oxides, chromium oxides, carbon black, anthraquinone pigments, quinacridone pigments, diketopyrrolopyrrole pigments, phthalocyanine pigments, azo pigment or isoindoline pigments. The taught weight ratio of components A and B is 10:1 to 1:10, or 9:91 to 91:9, which overlaps the claimed range.

U.S. patent 6,517,628 does not teach cosmetics containing ectoin, which is a pyrimidinecarboxylic acid. U.S. patent 6,060,071 teaches adding ectoin to lipsticks and surfactant-containing cleansers to improve and stabilize the hydration of the human skin. Thus one of ordinary skill in the art would have found it obvious to add ectoin to the lipstick, shampoo and shower gel suggested in U.S. patent 6,517,628 to improve and stabilize the hydration of the human skin, which is desirable in the art for the reasons given in lines 15-30 in U.S. patent 6,060,071. The references suggest the claimed composition.

The insertion of the limitation of claim 22 into claim 1 does not overcome the rejection since the U.S. patent 6,517,628 teaches the claimed glass flake based effect pigments which do not contain titania layers, as discussed above. In addition, WO 02/090448 and U.S. patents 6,045,914 and 5,753,371 and U.S. patent publication 2004/0123778 all teach that titania inherently forms in the anatase phase when forms on a glass flake. Thus the titania in the taught pigments where the titania layer is on the glass flake is inherently in the anatase phase. Furthermore, it is well known in the art that titania on a silica layer in effect pigments can be in

either the anatase or rutile phase. Thus the titania layers in the taught glass flake pigments are in the anatase or rutile phase. Applicants further argues that the reference do not teach the claimed glass flake thickness. Applicants are referred to column 2, lines 1-5 which teaches the thickness of the taught flakes, which can be glass flakes, is in the range of 0.4 to 2 microns, which overlaps the claimed range. The rejection is maintained.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Melissa Koslow whose telephone number is (571) 272-1371. The examiner can normally be reached on Monday-Friday from 8:00 AM to 3:30 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jerry Lorengo, can be reached at (571) 272-1233.

The fax number for all official communications is (571) 273-8300.

Art Unit: 1793

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/cmk/  
March 12, 2008

/C. Melissa Koslow/  
Primary Examiner  
Art Unit 1793